No. 85-1259 (6)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD LUNN TULL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the defendant in a civil action instituted by the Government in a Federal District Court to recover substantial civil penalties (in this case penalties sought were in excess of $22,000,000 and penalties received were in excess of $300,000) under a federal statute is entitled under the Seventh Amendment of the Constitution to a trial by jury.

PARTIES

The parties are listed in the caption to this case. No other individuals or corporations are parties.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-25a) is reported at 769 F.2d 182. The opinion of the District Court (Pet. App. 30a-63a) is reported at 615 F. Supp. 610, and the judgment order (Pet. App. 64a-66a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 30, 1985. A timely-filed petition for rehearing and suggestion for rehearing *en banc* was denied by a vote of six to five on October 30, 1985. A revised order denying the petition for rehearing and suggestion for rehearing

en banc was entered on November 4, 1985, with four judges dissenting. Pet. App. 28a-29a.

The petition for writ of certiorari was filed in this Court on January 24, 1986 and granted on May 27, 1986. J.A. 134. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND RULES INVOLVED

The Seventh Amendment and relevant provisions of the Clean Water Act of 1977, 33 U.S.C. § 1251, *et seq.*, and implementing regulations promulgated by the United States Army Corps of Engineers, are reprinted at Pet. App. 75a-81a. Rules 38(a), (b) and (c) of the Federal Rules of Civil Procedure are reprinted at JA 133.

STATEMENT OF CASE

The Government initiated this case by filing a three-count Complaint in the United States District Court for the Eastern District of Virginia on July 1, 1981, alleging in all three counts that Petitioner Tull had violated Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). The case primarily concerned Tull's filling activities several years earlier. Tull filled the properties in question, subdivided the properties and sold the lots. The factual allegations necessary for the Government to prove its case as alleged in the Complaint were as follows: Tull owned the respective properties (Pars. 8, 14, 20); there were wetlands on the properties, and these wetlands were waters of the United States (Pars. 9, 15, 21); Tull discharged fill materials into the wetlands on these properties (Pars. 10, 16, 22); the Secretary of the Army has not issued a permit for the filling (Pars. 11, 17, 23); and the filling without a permit constituted violations of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), (Pars. 12, 18, 24).

Only the factual allegation that Tull had not received a permit for filling the properties was admitted by Tull.

All of the other factual allegations were denied, thereby placing them in issue for trial. While the Complaint filed on July 1, 1981, sought injunctive relief, the Government knew that the property had been sold by Tull to others before the Government brought the case and that injunctive relief was unlikely if not impossible. The Government did not aggressively pursue its prayer for injunctive relief.[1]

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[1] THE COURT: Certainly Mr. Tull can't remedy what he's already sold.

What's the power of this Court to order somebody else who is not a party to this suit?

I can't take their property and dig a canal through their trailer park.

MISS DONLEY [representing the United States]: We will be offering a restoration plan, too, but it's important to consider the loss to the ecology of the wetlands that have been filled in evaluating what the remedy should be, and it's what's been done in all the other cases that I am aware of—is to—

THE COURT: *Well, I just want to know I'm not about to cut out somebody's land that has been sold by Mr. Tull,—*

MISS DONLEY: Very well, Your Honor.

THE COURT: There is no way I can do it constitutionally, but—

If he's filled in wetlands contrary to the law, and you show this, we can make him unfill his own land; but we can't make him unfill somebody else's land. [J.A. 110 (emphasis supplied).]

* * * *

THE COURT: Well, how is this admissible?

How is his idea of a restoration plan admissible? Under what theory?

I'm confused.

MISS DONLEY: Your Honor, when—

Normally when—

Normally these cases are heard as bifurcated cases, but when they are not—

THE COURT: *What you are saying is, since you claim that areas that were filled are now in the hands of third parties, and in an equity court it would be impossible to return 'em to the condition they were in, that some other plan must be utilized?*

MISS DONLEY: No, Your Honor.

We believe that Your Honor certainly would have the authority to require the properties that are actually the subject of this liti-

Counts One and Two of the Complaint alleged violations which had occurred a number of years earlier. Count One charged a violation for the filling of Ocean Breeze Mobile Home Subdivision and Ocean Breeze Mobile Home Subdivision Section "B" which contained 208 mobile home lots, with each lot approximately 5,000 square feet. Appendix in the Court of Appeals ("Cir. Ct. App.") 1419-20. The Complaint alleged that this filling was done between September 29, 1977, and November 14, 1980. JA 31. The evidence proved that Tull had completed this filling in 1979. Pet. App. 38a-39a. Ocean Breeze Section "C", which contained only 5 lots, was added by amendment later in the case, and had been completed in 1980. Pet. App. 38a.

Count Two alleged a violation for the filling of Mire Pond I Subdivision, which contained 29 camper trailer lots, each lot approximately 1,900 square feet in size. Cir. Ct. App. 1418. The Complaint alleged that this filling

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gation—to have those returned to wetlands if Your Honor required it. However,—

THE COURT: *You mean to say you think I would tell somebody who has a trailer out there: "You have the trailer, but, unfortunately, we're now going to dig up everything. We're going to leave the sewer line there and the water line there, and you can put your trailer up on stilts"?*

MISS DONLEY: Your Honor, what I said was that the United States believes that you have the authority to do that. Whether Your Honor would do that is another question.

THE COURT: *Where do you find that any Court has that authority?*

MISS DONLEY: Because the United States' position is—

THE COURT: *Forget the United States position. Where does the due process to a current owner of the lot come in?*

MISS DONLEY: The current owner of the lot would have an action against the developer for the damages that had been caused him.

THE COURT: *We would be taking something away from the current owner, then, wouldn't we?*

Shouldn't he be entitled to have his day in court? [JA 119 (emphasis supplied).]

was done between September 28, 1977, and November 14, 1980. JA 32. The evidence proved that Tull completed filling at Mire Pond I in 1978. Trial Transcript ("Tr.") 3442. All of the lots in Ocean Breeze, Ocean Breeze Section "B" and Mire Pond I which were the subject of Counts One and Two had been sold by Tull before the Complaint was filed. Only Count Three alleged a relatively recent violation. This alieged violation occurred in December 1980 (JA 33) and involved an alleged unlawful filling of one lot adjacent to Eel Creek. This lot, when filled by Tull, composed an area of approximately 12,000 square feet. Half of this property had been sold by Tull before the Complaint was filed, and Tull continued to own the balance of the lot until the case was decided. Pet. App. 47a. The only injunctive relief that flowed from the alleged violations contained in the Complaint was the court's order that Tull remove the fill from this 6,000 square-foot lot. Pet. App. 65a. Over 1,000,000 square feet of land was the subject of the Government's Complaint, and the Government obtained injunctive relief relating to only 6,000 square feet, or less than one percent.

The Government's Complaint demanded a civil penalty of $10,000 per day for the alleged violations that had occurred many years before (JA 34) and the imposition of potential civil penalties of $11,415,000 for the days of violation alleged in Count One (JA 31), $11,415,000 for the days alleged in Count Two (JA 32), and $60,000 for the days of violation alleged in Count Three. JA 33. The total potential civil penalties sought by the Government in the Complaint were thus $22,890,000.

The Government did not seek a temporary restraining order for any of the violations alleged in the Complaint. Nor would such an injunction have been appropriate, since, as noted, most of the property had been filled many years before, and all of the property had been sold,

except for half of the lot at Eel Creek. The Government was well aware that virtually all of the property had been sold to third parties, in some cases as much as five years prior to the Government's Complaint in July 1981. In fact, the Government introduced into evidence a list of the lots, the date that some had been sold, and copies (some incomplete) of some of the Deeds. Exs. 22a and 22b; Tr. 1575. None of these third parties to whom Tull had sold the improved land was named in the Complaint as a party. As the Government knew and the trial court pointed out, injunctive relief under these facts was impossible. *See supra* n.1.

The Government had been aware of Tull's filling activities at all of these properties while they were being filled. Numerous aerial photographs taken by the Corps of Engineers of the filling at Ocean Breeze and Ocean Breeze Section "B" were introduced into evidence. Cir. Ct. App. 1261-67, 1372, 1373, 1426-27, 1436-46. The district engineer and his staff made an on-site inspection in July 1976. Cir. Ct. App. 663-696. The development and filling of Mire Pond I were photographed and documented by a Corps of Engineers inspector, and the photographs introduced into evidence. Cir. Ct. App. 1421-25. Even the small lot next to Eel Creek was photographed by the Corps of Engineers, as it was being filled in December of 1980, and these photographs were also introduced by the Government. Cir. Ct. App. 1258-1260. The Government's delay in commenc[ing] civil action for appropriate relief, including a permanent or temporary injunction * * *," as permitted by 33 U.S.C. § 1319(b), betrays the extent of its alleged interest in that relief. Except for the small lot owned by Tull at Eel Creek, all of the equitable relief prayed for by the Government in the Complaint and permitted by the Clean Water Act was moot at the time of the Complaint.

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Tull demanded a "trial by jury of all issues

relied upon by Plaintiff in support of the relief prayed for in paragraphs 2. (restoration), 3. (civil penalties) and 4. (costs) of Plaintiff's prayer for relief." JA 33. Tull concedes now and did at the time of his jury trial demand that while the Government's prayer for an injunction, Prayer 1, was essentially moot at the time the Government filed the original complaint, Tull had no right to demand a jury as to equitable relief. Tull asserted in his jury trial demand that the predominant relief sought by the Government—civil penalties—would result in a money judgment that would be punitive in nature and that the Constitution and case law mandated a trial by jury. JA 78. Tull's memorandum in support of his jury trial demand stated that the Government's Complaint contained mixed issues of equity and law and that only the first prayer for relief alleged equitable jurisdiction, while prayers 2, 3, and 4 were for legal relief. Tull further asserted that prayer for relief 3, in particular, which sought civil penalties for $10,000.00 per day, was a prayer for legal relief in the form of a money judgment. The memorandum argued that Tull was entitled to a jury trial under the Seventh Amendment even though legal and equitable relief were combined in the same case, citing *Ross* v. *Bernhard*, 396 U.S. 531 (1970), as authority. Tull also relied upon *United States* v. *Regan*, 232 U.S. 37 (1914), for his contention that trial by jury was required in a civil penalty case.

The District Court, by Order entered September 9, 1981, denied Tull's demand for a jury trial, stating, "the relief sought by the United States is in every instance equitable in nature, or directives sought from the Court * * *." JA 80. However, in its opinion, the District Court conceded that it had heard legal issues in the case. Pet. App. 59a.

Nearly seven months after filing its original Complaint, the Government amended it on January 22, 1982, to include an additional piece of property, Mire Pond II

(adjacent to Mire Pond I), which Tull was developing at that time. The trial court ultimately found that the filling had occurred at Mire Pond II since February 1982. Pet. App. 39a. The Government sought and received a temporary restraining order on May 7, 1982, as to this property, and Tull ceased filling it. Except for the allegations relating to this additional property, which were contained in Count Four, the allegations of the Amended Complaint were the same as the Original Complaint, and Tull's Answer to the Amended Complaint put in issue the same factual contentions for trial. JA 66. Trial began on July 28, 1982, with the District Court sitting without a jury. During the trial, after the government rested its case and Tull made a motion to dismiss and enter partial summary judgment, the District Court granted the government's motion to re-open and amend for the second time. JA 120-124. This amended complaint, filed October 22, 1982, duplicated the prior complaints, but extended the time period of the alleged violations and asserted for the first time a claim under the Rivers and Harbors Act of 1899. JA 60. Tull's Answer and Grounds of Defense denied the allegations and placed the same facts in issue as under the Clean Water Act. JA 66. The Rivers and Harbors Act does not provide for civil penalties. Pet. App. 76a.

During the fifteen-day trial, the Government presented the testimony of 16 witnesses and introduced 87 exhibits. Tull presented the testimony of 16 witnesses and introduced 46 exhibits.

Briefly, the trial evidence demonstrated that Tull is engaged in the business of developing residential properties on the island of Chincoteague, Virgina. In July 1976, Tull obtained advice from his engineer and his attorney to ensure that the proposed work would not encroach into the Corps of Engineers jurisdiction. Cir. Ct. App. 941. As an additional precaution, Tull requested a determination from officials in the Corps itself "to see if they had any objection to any work on any of the property there—

any of the filling of the property." Cir. Ct. App. 951-952. Pursuant to Tull's request, a jurisdictional inspection of these properties was conducted by the Corps' Norfolk District Engineer and his staff, which included the Chief of the Construction Operations Division, the Chief of the Regulatory Functions Branch, the Chief of the Waterways Inspection Branch, an employee of the Permits Branch, an employee of the Enforcement Division, and two Corps counsel. Cir. Ct. App. 663-670. The Corps counsel, whose duties included jurisdictional determinations (Cir. Ct. App. 663), confirmed that the express purpose of the inspection was to view the work ongoing at the sites in order to determine whether the activity was within the Corps' jurisdiction (Cir. Ct. App. 672) and was being carried on without a necessary permit. Cir. Ct. App. 709.

After being advised by the District Engineer that fill could not be placed at two locations, Tull proceeded with his plans as to the remaining properties. Cir. Ct. App. 518. He did not fill the areas where he was instructed that a permit would be required. Cir. Ct. App. 503-504, 719, 807, 838-839, 960, 962, 1383.

After the inspection, the Corps continued to monitor Tull's ongoing filling and construction activities by aerial inspections and photographs. Cir. Ct. App. 1142-46. These photographs demonstrated the progress of the work, which included pushing fill material into a drainage ditch (Cir. Ct. App. 1261, 1262, 1273, 1427, 1439-42), construction of utilities and roads (Cir. Ct. App. 1371-72) and, ultimately, the sale of the properties to third parties and the placement of trailers on the lots. Cir. Ct. App. 1265-67, 1446. These improvements were made at substantial expense to Tull. Cir. Ct. App. 1382.

At no time during the five years between the inspection and the filing of the Complaint in this case did the District Engineer issue a cease and desist order or any other notification that Tull's filling activity was unau-

thorized (Cir. Ct. App. 961-962), even though such notice is required by the Corps' regulations. 33 C.F.R. 209.120(g)(12) (1975) and 33 C.F.R. 362.2 (1977). Pet. App. 80a-81a.

In order to prove that the property at issue was in fact "wetlands" for which a permit was required before fill material could be placed upon it, the Government began by presenting the testimony of Richard Sumner. Sumner was the "field investigator" of Tull's property for the Environmental Protection Agency. Tr. 134. Sumner described how the EPA became administratively aware of Tull's activities on his property through a "formal request for assistance" from the Corps on September 17, 1980. He obtained historical photos covering the Ocean Breeze area and documents, narratives, memos and reports, prepared by the Army Corps of Engineers, describing in general terms these sites. Tr. 139-140. He testified to his opinion that there were areas of "wetlands" within Tull's property. Tr. 304. He developed the methodology upon which he reached that conclusion from the historical materials furnished him by the Corps and his inspections of the properties. Tr. 320. Sumner testified concerning various soil tests and mapping techniques which the Government used on Tull's properties. Tr. 231-233. On cross-examination, Sumner conceded that the location of certain test sample holes had been changed on key Government exhibits. Cir. Ct. App. 230-246. Thus an issue of the credibility of the Government's evidence was directly raised.

John Clay, a soil consultant, who had made reports in 1975 for the Accomac County Board of Health, testified as to the feasibility of septic fields being constructed at that time on portions of Tull's property. Tr. 920-922. The Government elicited Clay's opinion as to the status of Tull's property under the relevant Corps regulations defining "wetlands". Tr. 933-934. Clay's opinion was that the property contained tidal marsh, and yet he admitted on cross-examination that he had only been on

the property on one occasion for a period of one hour and had made no tidal studies. Cir. Ct. App. 302. At least the weight, if not the credibility, of Clay's testimony thus became an important issue.

William Sipple testified as an expert in photographic interpretation of environmental areas. Tr. 962. Sipple was a key Government witness, as his task had been to map the alleged wetlands areas and prepare key exhibits used by the Government at trial. Cir. Ct. App. 366. On cross-examination, Sipple admitted that on a key Government exhibit the extent of the wetlands was altered. so that on Tull's property wetlands were shown to be seventy feet wide, while on the property next to Tull's, they were shown to be only ten feet wide, even though the vegetation was the same. Cir. Ct. App. 1364-70.[2] Sipple's admission concerning the alteration of evidence raised an issue of credibility not only as to the witness, but also as to the wetlands/uplands maps which were the central mainstay of the Government's case.

Milton McCarthy, with the United States Department of Interior (Tr. 1697), Edward Christoffer, an employee of the National Marine Fisheries Service (Tr. 1697), Julian Hume, III, an employee in the Permit Section of the Army Corps of Engineers (Tr. 1731), Gerald Tracey, an environmental scientist employed by the Corps (Tr. 1773), and Alexander Dolgas, an employee of the enforcement section of the Corps (Tr. 2031), also testified for the Government in its attempt to establish what portion, if any, of Tull's property was "wetlands" under the definition contained in the Corps' regulations. Some witnesses testified that certain vegetation types were obligate (always found in wetlands) or faculative (found in wetlands and uplands). Cir. Ct. App. 225, 320, 638-640, 805-806. The Government's own employees from the Corps Permits Section, Hume and Williams, agreed that

[2] Sipple also testified concerning the classification of certain vegetation that is found in both uplands and wetlands. Tr. 977-978.

what constitutes "wetlands" under the regulatory definition is a judgment call (Cir. Ct. App. 775, 803) and that the experts differ. Cir. Ct. App. 776, 777.

After conflicting testimony of the Government's witnesses, the trial court retained its own expert, Professor Donna Ware. Pet. App. 41a. Ware opined that a portion of Tull's filled property was a wetland that had in the past been tidally influenced before being disrupted. Cir. Ct. App. 1188-89. Ware could not determine when this disruption occurred. Cir. Ct. App. 1189. Ronald Beebe, a civil engineer, testified on Tull's behalf. He testified that Tull's activities took place well above the mean high water mark, and that there was no tidal influence upon the property in issue. Tr. 2780. Beebe, a long-time resident of the area, testified that the property in question had been bermed for farming many years before, contained road beds, was used for grazing cattle and, in the past, had had an airfield on it. Cir. Ct. App. 814, 891-892, 1233.

In addition to the cross-examination of the Government's witnesses, Tull affirmatively presented the testimony of numerous witnesses to prove his contention that the property the Government alleged to be within the Corps' jurisdiction was in fact not "wetlands". For example, Dr. David Adams, a wetlands expert, testified that based on his investigation and after thirty to forty sample holes dug at Ocean Breeze, he concluded that the area was a complex system difficult to reconstruct with any precision. Cir. Ct. App. 626-635. Donald Turner, a sanitarian for the Accomac County Board of Health, testified that areas the Government exhibits showed as wetlands could not be wetlands, as they contained drainfields which are not permitted to be placed in wetlands. Tr. 2622-48, 2668-69.

After the fifteen-day trial, the District Court entered its Order and Opinion on September 28, 1983, assessing civil penalties and granting judgment for the Govern-

ment in the sum of $325,000.[3] The court made good an earlier promise that if the case could not be settled and Tull lost, he would lose "a ton."[4] Tull was *not* ordered

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[3] While the District Court gave Tull the option to avoid payment of $250,000 of the civil penalty by certain restoration work (Pet. App. 65a), it recognized during the trial that this was impossible, as Tull had long since completed the development and sold the lots to third parties. *See supra* n.1. Tull's petition to restore a drainage ditch in an alternative location based upon his affidavit that restoration in its original location was impossible because the property has been sold to others was denied by the District Court. JA 82-109.

[4] THE COURT: Mr. Nageotte, you can't think of any way you could settle this case? It's going to cost your client a ton if he loses. If he loses,—I'm not saying he is, but I'm just going to say if he loses—it's going to cost you a ton.

Now the government—

You've got some real hurdles to overcome.

Remember the burden is on you-all, and you might not be able to prove certain things.

You just might not be able to prove it.

No need being adamant. If you can get yourself some wetlands back, I'd try to grab 'em and go.

MR. NAGEOTTE: Judge, I can honestly say again whatever penalty Your Honor would—

Even if my client lost this case, whatever penalty in your wildest dreams you could impose would not be worse than what the government wants,—

THE COURT: All right.

MR. NAGEOTTE: —and on those facts, Your Honor, there's hardly any way to settle.

THE COURT: All right. In that case—

I can't believe that,—

MR. NAGEOTTE: Well—

THE COURT: —because I am a mean, ornery old soul. You just haven't seen me.

MR. NAGEOTTE: Well—

THE COURT: I believe in the government getting back money, Mr. Nageotte,—

MR. NAGEOTTE: Well—

THE COURT: —and the way I can get it to 'em—I'm better than the Internal Revenue Service. I can tell you that.

[Continued]

to remove the fill material from any of the 208 lots he had filled and sold in Ocean Breeze.[5] Tull was assessed a "penalty or civil fine" for filling at Ocean Breeze Mobile Home Sites in the amount of $35,000. Pet. App. 64a. For filling six lots at Mire Pond I and one lot at Mire Pond II, Tull received a "penalty or civil fine" in the amount of $35,000 (Pet. App. 64a), and for filling the lot at Eel Creek a "penalty or civil fine" in the amount of $5,000. Pet. App. 64a. Fill material was ordered removed from two upland lots at Mire Pond II as mitigation for filling Mire Pond I. Pet. App. 65a. After Tull's Motion for a New Trial was denied, Tull appealed to the Fourth Circuit.

The majority of the panel of the Court of Appeals, in a two-to-one decision, affirmed, finding no merit in Tull's claim that he had a right to a jury trial in this case." Pet. App. 8a. The majority held that "the Seventh Amendment right to a jury trial is limited to suits in the nature of an action existing at common law when the Amendment was adopted. *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 458 (1977); *NLRB* v. *Jones and Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937)." The majority noted that Congress may constitutionally enact a statutory remedy unknown at common law, vesting fact-finding in an admin-

[4] [Continued]

I pay a lot of taxes, and I don't have many deductions in this job. I'm finding that out quickly.

I used to have a lot of 'em in that old job.

MR. NAGEOTTE: Well, I hope Your Honor's position won't affect your thinking in this case.

THE COURT: I'll try not to make it affected too much. [JA 117.]

[5] While the suit was pending, Tull platted an additional Section of Ocean Breeze which contained only 5 lots. This section, Ocean Breeze Section "C", had not yet been recorded or sold because of the pending suit. Some portions of these lots had been filled in 1980. The trial court ordered the fill removed from these lots unless Tull was granted an after-the-fact permit from the Army Corps of Engineers. Pet. App. 65a.

istrative agency or others without the need for a jury trial. Pet. App. at 8a. The majority further noted that "the Supreme Court has left open the question whether the Seventh Amendment has no application to government litigation at all," citing *Atlas Roofing*, 430 U.S. at 449 n.6. Moreover, "even assuming that the Seventh Amendment applies to government litigation, the fact that the government is suing to collect statutory penalties does not require a jury trial." Pet. App. 9a.

Judge Warriner dissented, objecting to the majority's analysis and application of this Court's precedents. He concluded that "since the remedies sought by the Government were both legal and equitable, and the district court may hear both at the same time * * * and the findings of fact necessary to determine what civil penalties, if any, would be adjudged are the same as those to be decided for the equitable remedies sought, the case should have been heard before a jury upon the defendant's demands." Pet. App. 25a.

Tull petitioned the Court of Appeals for a rehearing *en banc*. The petition was denied by a vote of six-to-five on October 30, 1985. Pet. App. 26a-28a. A revised order denying the petition for rehearing *en banc* was entered on November 4, 1985, with four judges dissenting. Pet. App. 28a-29a. This Court granted certiorari on May 27, 1986. JA 134.

SUMMARY OF ARGUMENT

Under the Seventh Amendment the right to trial by jury applies in all cases in which the value in controversy exceeds twenty dollars and "the action involves rights and remedies of the sort typically enforced in an action at law." *Curtis* v. *Loether*, 415 U.S. 189, 195 (1974). The right to trial by jury in civil penalty actions instituted by the government was recognized as early as Magna Carta. Jury trial was a routine feature in civil penalty actions at the time the Seventh Amendment was adopted, and common practice thereafter. There have been many decided cases involving issues implicated by the right

to jury trial in penalty actions instituted by the Government, such as the appropriateness of directed verdicts and new trials, the burden of proof, whether such actions were civil or criminal, and so on. Significantly, no case held, or even inferred, that the jury trial right did not exist. To the contrary, in every case it was assumed to exist and constituted the very foundation of the Court's decision. It would be an extraordinary jurisprudential oversight if for almost two hundred years the jury trial right under the Seventh Amendment were suddenly discovered never to have existed in civil penalty cases.

The right to jury trial is not defeated simply because the statute provides for and the Government seeks equitable relief in addition to civil penalties. This Court has long recognized that the presence of equitable and legal claims in the same action cannot operate to defeat the right to jury trial on the legal claims. *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959); *Dairy Queen* v. *Woods*, 369 U.S. 469 (1962); *Ross* v. *Bernhard*, 396 U.S. 531 (1970). It would trivialize the constitutional protection of the right to trial by jury to permit the Government to avoid presenting its case to a jury by the simple expedient of appending a catch-all claim for such equitable relief as may be appropriate to any civil penalty action. The dangers of such a view are clearly illustrated by the present case. From the outset it was clear that the Government's interest in this litigation was the imposition of penalties to punish Tull, rather than any equitable relief. The question of equitable relief in this case was largely moot from the outset.

The right to trial by jury is particularly important in actions brought by the Government. Modern statutes provide for the imposition of civil penalties in amounts that can dwarf the amount of fines that may be imposed in a criminal case for which a jury is clearly required. Indeed, the cases holding that penalty actions were civil in nature assumed that a jury would still be interposed between the Government and the accused. The foundation

of those cases would be undermined were the right to jury trial now found to be inapplicable.

A citizen is most in need of the protection of a jury when sued by the Government, with its vast resources. It would be a strange doctrine that the Government may not take away the right to jury trial in a case between two private parties, but is free to do so when it itself is a party. Recognizing the right to jury trial in civil penalty actions in no way interferes with legitimate interests of the Government, since Congress is free in any case involving public rights to vest factfinding and initial adjudicatory responsibilities in an administrative agency, with no right to jury trial. *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977). Congress did not do so in this case, but rather invoked the jurisdiction of the District Courts for such responsibilities. In so doing, Congress triggered the protections of the Seventh Amendment. *Curtis* v. *Loether*, 415 U.S. at 195.

Contrary to the Government's assertion, there clearly were issues for a jury to decide in this case. Every factual allegation of the Government was contested by Tull, except for the allegation that the filling was conducted without a permit. The District Court made numerous findings of fact and weighed the credibility of witnesses, usurping the proper functions of the jury requested by Tull. A jury should also have been empowered to determine the amount of any penalties imposed on Tull, assuming it would have found that he violated the Act. The fact that the statute provides a range of penalties in no way disqualifies a jury from this function, since juries often are called upon to set fines, sentences, or damages within a broad range of permissible possibilities. A jury is peculiarly necessary in light of the awesome power that the civil penalty statutes would otherwise place at the disposal of a single judge. In this case, for example, the judge could have imposed penalties of over $22,000,000 on Tull. The sheer magnitude of this power calls for the interposition of a jury between the accusation and the

judgment, as provided in the Seventh Amendment. This would still reserve to the trial court, in appropriate cases, whatever equitable issues remained in the case.

I. There Was A Right To Trial By Jury In This Civil Penalty Action Because Such Actions Have Historically Been Viewed As Actions At Law

The Seventh Amendment provides: "In Suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *." In this case, the civil penalties sought exceeded $22,000,000 and the civil penalties imposed were in excess of $300,000.[6] The question, then, concerns interpretation of the phrase "Suits at common law" in the Seventh Amendment.

In *Curtis* v. *Loether*, *supra*, this Court "gave broad scope to the entitlement to a jury trial in actions for the enforcement of rights provided by twentieth-century statutes." *United States* v. *J.B. Williams Co.*, 498 F.2d 414, 424 (2d Cir. 1974) (Friendly, J.) This Court in *Curtis* held that the Seventh Amendment right to a jury trial applied to actions for damages under Title VIII of the Civil Rights Act, 42 U.S.C. § 3612, even though such actions did not, of course, exist in 1791 when the Amendment was adopted. As the Court noted, "although the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of

[6] It is not necessary in this case for the Court to define the precise lower monetary limit on the right to trial by jury. In an appropriate case the Court could decide that the drafters of the Seventh Amendment intended the right to apply only in cases in which a significant amount was in dispute, and settled upon the twenty dollar figure as appropriate at that time to exclude *de minimis* disputes. Even if the Court were to consider a higher figure necessary in light of economic developments to effectuate this intent, it is clear that the present case—in which over $22,000,000 in penalties could have been assessed and in which over $300,000 in penalties were actually assessed—would easily surpass any conceivable limit designed to exclude *de minimis* disputes.

actions recognized at that time." 415 U.S. at 193. *See Parson* v. *Bedford*, 28 U.S. 433, 446-447 (1830). The Court reasoned that "a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law." 415 U.S. at 195.

The question, then, is whether a civil penalty action "involves rights and remedies of the sort typically enforced in an action at law." Civil penalty actions brought by the Government have long been considered actions at law. Historically, the only controversy was whether such penalty actions were criminal rather than civil. It has never been questioned that when the Government institutes a suit for civil penalties, a jury is required upon demand.

The right of trial by jury in civil penalty cases first appears in the Magna Carta granted by King John in 1215 under threat of civil war. Actions to collect civil penalties or fines, called amercements,[7] were required by Magna Carta to be tried by a jury. Magna Carta provided:

> Amercements for slight offenses shall be in accordance with the measure of the offense. Amercements for serious offenses shall not be so heavy as to deprive anyone of his means of livelihood. *Amercements to be assessed by honest men of the neighborhood.* Earls and barons are to be amerced by their peers according to the measure of their offense. (emphasis supplied)

Even though the right of trial by jury was discarded in many civil actions in England, it was retained for penal statutes. *See* Mathew Hale, *The History of The Common Law* (4th ed. page 298).

Sixteen years before the enactment of the Seventh Amendment, in the case of *Atcheson* v. *Everitt*, 1 Cowper 382 (1776), the English court found it necessary to de-

[7] "AMERCEMENT. A pecuniary penalty, in the nature of a fine, imposed upon a person for some fault or misconduct, he being 'in mercy' for his offense." Black's Law Dictionary, 4th ed., p. 107.

termine whether a statute to recover a penalty attended with disabilities was a criminal or civil cause. A Quaker's testimony was not admissible in criminal cases because of his refusal to take the oath, but was acceptable in a civil cause of action. Thus, the question presented was whether a penalty action was a criminal or civil cause of action and, if civil, its nature. Lord Mansfield noted that there being no case in point, it is a material circumstance that actions for penalties are, to a variety of purposes, considered as civil suits. Justice Ashton believed them to be criminal. Lord Mansfield noted that penal actions were never yet put under the head of criminal laws or crimes. Such actions were considered as much civil actions as actions for money had and received. The court held that a Quaker's testimony on his affirmation was admissible because a civil penalty suit was an action in debt. *Id.* at 391. Such actions, of course, are legal, not equitable.

In *Calcraft* v. *Gibbs*, 5 Term. Rep. 19 (1792), the English court held that a new trial could be granted in a civil penalty case in which the jury found for the defendant, because the cause was an action in debt for a penalty. Accordingly, at the same time the Seventh Amendment was adopted in this country, English courts were trying civil penalty cases as common law actions in debt, with a jury.

From the enactment of the Seventh Amendment, our courts followed the common law of England, treating cases for civil penalties as actions in debt subject to trial by jury. In 1795, it was held that bail was not required in a civil penalty case because it was an action in debt. This case was tried by a jury. *United States* v. *Mulvaney*, Fed. Case No. 15,834.

In 1810, the United States filed an action in debt to recover a penalty of $20,000 under the Embargo Act. The jury in the District Court found against the defendant, but the court assessed the amount of the penalty.

The appeals court reversed, and one of the grounds of reversal was that the jury ought to have assessed the penalty. *United States* v. *Allen*, Fed. Case No. 14,431.

In 1821, the United States recovered a civil penalty in the amount of $500 and costs for violation of an act of Congress. The jury found its verdict in favor of the United States. However, the statute upon which the United States sued did not expressly set out the nature of the remedy. The court held that in such a case, an action in debt lies. *Jacob* v. *United States*, Fed. Case No. 7,157.

In 1854, the United States sued for a civil penalty imposed under a statute providing that the right to sue was limited to a person. In affirming the right of the United States to sue in such cases, the court held that it was a long settled principle of common law that an action in debt is maintainable to recover a pecuniary penalty imposed by statute, and when such a penalty is incurred by violation of a statute of the United States, it accrues to the Government and may be sued for in its name. The court, interpreting the 9th section of the Judiciary Act of 1789, 1 Stat. 76, declared that a civil penalty suit came under the provision that stated, "the court shall have cognizance of all suits *at common law* where the United States sues and the matter in dispute amounts, exclusive of costs, to the sum of $100.00." (emphasis supplied). Penalty actions, therefore, are suits "at common law" brought by the United States. *United States* v. *Bougher*, Fed. Case No. 14,627.

In 1871, this Court reversed a lower court holding that when the United States seeks a penalty based on an offense against law, it must be by indictment or by information. The Court held that "whether the liability incurred is to be regarded as a penalty or as liquidated damages for an injury done to the United States, *it is a debt*, and as such it must be recoverable in a civil action." *Stockwell* v. *United States*, 13 Wall. 531, 542 (1871)

(emphasis supplied). The case was tried to a jury, and the second assignment of error involved the instructions to the jury. The penalty sought was double the value of shingles alleged to have been illegally imported into the United States. Accordingly, the jury was required to ascertain the value of the shingles in order to double that value for purposes of imposition of the penalty. *Id.*

Three years later, in 1874, this Court again had occasion to hear a case involving instructions to the jury in an action brought by the United States to recover a statutory penalty. The case was an action in debt, to recover the penalty prescribed by the 48th section of the Revenue Act of June 30, 1864. The statute provided for a penalty of $500 or not less than double the amount of duties fraudulently attempted to be evaded. The jury was instructed that the Government need only prove that the defendants were presumptively guilty and the burden thereupon shifted to them to establish their innocence; if they did not carry that burden, they were to be considered guilty beyond a reasonable doubt. In reversing, this Court said, "the instruction sets at naught established principles, and justifies the criticism of counsel that it substantially withdrew from the defendants their constitutional right of trial by jury, and converted what at law was intended for their protection—the right to refuse to testify—into the machinery for their sure destruction." *Chaffee* v. *United States*, 18 Wall. 516 (1874.)[8] *See also Lees* v. *United States*, 150 U.S. 476 (1893) ("Although the recovery of a penalty is a proceeding criminal in nature, yet in this class of cases, it may be enforced in a civil action, and in the same manner that debts are recovered in the ordinary civil courts"); *United States* v. *Zucker*, 161 U.S. 475 (1896).

[8] Proof beyond a reasonable doubt is no longer the standard in a civil penalty case, but *Chaffee* demonstrates that regardless of the standard of proof, cases seeking statutory penalties were viewed as triggering the "constitutional right of trial by jury."

As the foregoing decisions demonstrate, actions by the Government to recover penalties under statutory provisions have historically been viewed as actions in debt—common law actions requiring trial by jury.

It was against this background that the Court decided *Hepner* v. *United States*, 213 U.S. 103 (1909). The Court was asked by the Circuit Court of Appeals whether the trial judge could direct a verdict in favor of the Government in a case where there was undisputed testimony that a defendant had committed an offense against a Federal statute providing for a $1,000 civil penalty. In answering in the affirmative, this Court said:

> [T]he objection made in behalf of the defendant, that an affirmative answer to the question certified could be used so as to destroy the constitutional right of trial by jury, is without merit and need not be discussed. *The defendant was, of course, entitled to have a jury summoned in this case*, but that right was subject to the condition, fundamental in the conduct of civil actions, that the court may withdraw a case from the jury and direct a verdict, according to the law if the evidence is uncontradicted and raises only a question of law. Restricting our decision to civil cases, in which the testimony is undisputed, and without qualifying former decisions requiring the court to send a case to the jury, under proper instructions as to the law, where the evidence is conflicting on any essential point, we answer the question here certified in the affirmative. [*Id.* at 108.]

In *United States* v. *Regan*, 232 U.S. 37 (1914), this Court reversed what it termed "*an action of debt prosecuted by the United States*, under * * * the Alien Immigration Act, to recover $1,000.00 as a penalty for an alleged violation by the defendant * * *." *Id.* at 40 (emphasis supplied). The issue was a jury instruction relating to the burden of proof. This Court held that the instruction requiring proof beyond a reasonable doubt was incorrect because, "while the defendant was entitled

to have the issues tried before a jury, this right did not arise from Article III of the Constitution or from the Sixth Amendment, for both relate to prosecutions which are strictly criminal in their nature * * * *but it did arise out of the fact that in a civil action of debt involving more than $20.00 a jury trial is demandable.*" *Id.* at 47 (emphasis supplied).[9] *See also Chicago, Burlington and Quincy Ry. Co.* v. *United States*, 220 U.S. 559 (1911) ("as respects a pecuniary penalty for the commission of a public offense, Congress competently may authorize * * * the enforcement of such penalty by either a criminal prosecution or a civil action; and * * * if not directed otherwise, such [a civil] action is to be conducted and determined according to the same rules and with the same incidents as are other civil actions").

Porter v. *Warner Holding Co.*, 328 U.S. 395 (1946), held that a court in equity had the power to order restitution of rents collected by a landlord in excess of the permissible maximum under Section 205(a) of the Emergency Price Control Act of 1942. The Court was careful to distinguish this restitution remedy from one for damages in the nature of penalties under Section 205(e) of the Act. Such penalty actions would have to be brought in a court of law rather than in a court of equity. 328 U.S. at 401-402.

More recently, in 1980, this Court held that the imposition of a civil penalty in the amount of $500 (reduced by the District Court to $250 after a jury trial) as a result of an oil spill report required under the Federal

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[9] The strong words used by this Court make it clear that given the issue presented, *i.e.*, a jury instruction concerning the burden of proof in a civil penalty case, the Seventh Amendment applies. We submit that this statement is more than *dictum* because it was made in the context of a jury instruction holding by this Court. If the Seventh Amendment did not require trial by jury in a civil penalty case, the Court would not have addressed the jury instruction issue, as it would have been moot.

Water Pollution Control Act, 33 U.S.C. § 1321(b)(5), was a civil penalty and not a criminal or quasi-criminal penalty. Therefore, the Fifth Amendment protection against self-incrimination in a criminal case did not apply. This case is significant because it was brought under a different section of the same statute as the instant case and was tried to a jury. *United States* v. *Ward*, 448 U.S. 242, 247 (1980).

As the above historical analysis makes clear, civil penalty actions have been in existence for over seven centuries. They were in existence when the Seventh Amendment was adopted, and had been clearly defined as common law civil actions for debt, and were tried by juries. Given this historical background, Judge Friendly concluded for the Second Circuit that the Government was "[n]ot * * * able seriously to dispute that an action to recover a statutory penalty generally carries the right to a jury trial." *United States* v. *J.B. Williams Co.*, 498 F.2d at 424.

II. The Fact That The Statute Provides Both Equitable And Legal Relief Cannot Defeat The Right To A Jury Trial

A. *The Historical Perspective*

The court below held that the Seventh Amendment did not apply to civil penalty actions because "the assessment of penalties intertwines with the imposition of traditional equitable relief." Pet. App. 9a. This Court has often held, however, that the mere fact that legal and equitable claims are joined cannot operate to defeat the right to jury trial. While the Federal judicial system has formally abandoned the distinction between equity and law and recognized a unitary civil action, this Court has consistently maintained the integrity of the constitutional mandate that legal issues in dispute in the Federal courts be tried by juries. *See Beacon Theatres* v. *Westover*, *supra*; *Dairy Queen* v. *Woods*, *supra*; *Ross* v. *Bernhard*, *supra*.

The mere fact that in this case the Government sought both injunctive relief and substantial civil penalties does not operate to deny Tull his right to have a jury try the Government's claim for civil penalties and the facts pertinent to their imposition. As this Court has steadfastly maintained:

> If the action is properly viewed as one for damages only, our conclusion that this is a legal claim obviously requires a jury trial on demand. And if this is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal claims as "incidental" to the equitable relief sought. *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500; *Dairy Queen, Inc.* v. *Wood*, 369 U.S., at 469, 470-473. [*Curtis v. Loether*, 415 U.S. at 196 n.11.]

To say that the Government's Complaint initiated an action in District Court that was equitable in nature would be factually and historically incorrect. Civil penalties were not part of the "remedies, procedures and practices" evolving from English Court of Chancery. *See Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 164-166 (1939). This Court has consistently acknowledged that the phrase "suits in equity" refers to suits in which relief is sought according to principles applied by English Courts of Chancery before 1789. *Gordon* v. *Washington*, 295 U.S. 30 (1935); *Atlas Life Ins. Co.* v. *W.I. Southern, Inc.*, 306 U.S. 563 (1939). As demonstrated above, suits for civil penalties were not tried in the English Court of Chancery before 1789, but were tried in the common law courts as actions in debt, with a jury. The civil penalties sought in this case were not an adjunct of, or incidental to, equitable relief; the so-called equitable relief was a catch-all remedy, almost wholly moot at the time of the action, that was itself incidental to the imposition of fines and penalties. If this action were sufficiently "equitable" to defeat a request for a jury, a jury trial

could be thwarted in *any* action for damages, fines, or penalties, simply by the addition of a conclusory request for an injunction.

Moreover, regardless of whether the injunction was incidental to the imposition of civil penalties, or vice versa, that is the wrong test. It is precisely the one rejected by this Court in *Dairy Queen, supra*, where this Court held that under *Beacon Theatres, supra*, entitlement to a jury trial "applies whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not." 369 U.S. at 473. *Cf. Stevens* v. *Gladdings*, 17 How. 448, 453-455 (1854) private claim for penalties not to be tried by equity court even when sought as one claim among a number that included injunctive relief and accounting for profits).

The court below considered a jury trial as to penalties inappropriate because the "district court fashions a 'package' of remedies, one part of the package affecting assessment of the others." Pet. App. 9a-10a. The same was true, however, in *Curtis* v. *Loether, supra*, and indeed is true in any case combining legal and equitable relief. In *Curtis* this Court recognized the right to a jury trial in an action enforcing statutory rights even though the statute provided a "package" of equitable and monetary relief. The statute at issue provided that the "court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorneys fees." 42 U.S.C. § 3612(c). The fact that equitable and legal relief were joined in this "package" did not prevent this Court in *Curtis* from upholding the right to jury trial.

In civil penalty actions in which the Government also seeks equitable relief, the legal issues must be tried to a jury and any equitable issues to the judge. There is noth-

ing unusual about this approach; it is the typical manner of handling any case in which legal and equitable claims are joined. *See Beacon Theatres, Inc.* v. *Westover, supra; Dairy Queen, Inc.* v. *Wood, supra.* Assuming that liability is found, the jury assesses the amount of civil penalties to be imposed, within the range provided by law, and the judge provides such equitable relief as may be appropriate. Again, there is nothing surprising or unusual about such a division of responsibility. It is simply an unexceptional consequence of preserving the Seventh Amendment right after the merger of law and equity.

B. *The Statute at Issue*

Nothing in the Clean Water Act or its legislative history implies any intent on the part of Congress to deny Tull his constitutionally protected right to a jury trial, simply because Congress provided a variety of remedies under the Act. The structure of the statute in fact refutes any such Congressional intent.

Section 1319 of Title 33, United States Code, sets out in three separate subsections the jurisdiction of the District Courts, corresponding to the equitable, criminal and legal duties imposed. The equitable jurisdiction of the District Courts is clearly provided in Subsection (b) of Section 1319, authorizing commencement of "a civil action for appropriate relief, including a permanent and temporary injunction, for any violation for which [the Administrator] is authorized to issue a compliance order under subsection (a) of this section." The Federal District Courts are given exclusive jurisdiction over such civil actions, and Section 1319(b) further provides that "such court shall have jurisdiction to restrain such violation and to require compliance." The enforcement provision provides for criminal sanctions in a separate subsection, 33 U.S.C. § 1319(c), and in another separate subsection, 33 U.S.C. § 1319(d), provides for the civil penalties at issue here. *See* Pet. App. 77a.

The Court of Appeals' holding that "the government is not suing to collect a penalty analogous to a remedy at law" (*id.*) is contradicted by the very structure of the enforcement provisions of the Clean Water Act. The provision for civil penalties found in 33 U.S.C. § 1319 (d) does not "intertwine with the imposition of equitable relief." Pet. App. 9a. It is instead a distinct and separate legal remedy which may be imposed in addition to or independent of equitable relief. Congress clearly did not provide that the civil penalties become "traditional equitable relief" or intertwined with equitable relief to be assessed in the discretion of trial judges. The Clean Water Act plainly separates the equitable relief the District Courts may provide in 33 U.S.C. § 1319(b), and the legal relief provided in 33 U.S.C. § 1319(d), which may, upon demand, be tried by a jury.

Had Congress intended civil penalties to be equitable relief assessable by trial judges alone, not only would the separation of the two distinct forms of remedies in separate subsections of the enforcement provisions have been inappropriate, but Congress would have specifically announced its intent in the statute and included within Section 1319(b) a statutory authorization for the District Court to assess civil penalties. As Judge Warriner noted in dissent below, "33 U.S.C. § 1319(b) provides for all usual equitable remedies to be available to the government * * *. The civil penalty of subsection (d) is another matter entirely." Pet. App. 25a.

By providing for each independent form of relief applicable under the statute in distinct and separate subsections, without expressing any intent that these remedies be enforced in other than the usual and traditional manner provided by the Constitution and the Federal Rules of Civil Procedure, Congress clearly did not intend, as the majority below believed, to abrogate the right to jury trial by granting the District Court the right to fashion a "package" of remedies. Under the majority's

analysis, Tull could also have been deprived of his right to a trial by jury under the Sixth Amendment had the Government, in addition, sought the criminal penalties provided in the statute. *See* 33 U.S.C. § 1319(c) (one year imprisonment for the first conviction and two years imprisonment for the second conviction). If the separate provisions for equitable relief in Section 1319(b) and legal relief in Section 1319(d) can be combined to grant jurisdiction to trial courts to fashion "packages" of remedies which intertwine with the imposition of traditional equitable relief, with the resulting loss of Seventh Amendment rights, then the logic of the majority's analysis would dictate that the criminal relief in Section 1319(c) could also be included in the "package" and similarly result in the loss of Sixth Amendment rights.

III. The Right To Trial By Jury Must Be Particularly Protected in Penalty Actions Brought By The Government

The Drafters of the Bill of Rights provided the protection of a jury trial in "all criminal prosecutions" under the Sixth Amendment, and in all suits at common law where the value in controversy exceeded twenty dollars under the Seventh Amendment. There is no evidence that they intended the Government to be able to avoid submitting its case to a jury when seeking to impose substantial civil penalties. Such a position would be devoid of logic. As this case demonstrates, the penalties imposed on an individual under a civil penalty statute can far exceed the fines that might be imposed under many if not most criminal statutes. Penalties in this case of over $22,000,000 were sought, and penalties in excess of $300,000 were actually imposed. It would be a strange doctrine that the protections of a jury trial would not be required under the seventh amendment when the government seeks millions of dollars in civil penalties, while a jury is required under the sixth amendment when the government seeks insignificant penalties in criminal cases.

Many of the cases discussed above addressed the question of whether a penalty action should be considered criminal or civil in nature. In the cases deciding that such actions were civil, the courts assumed that the right to a jury trial applied. *See, e.g., Calcraft* v. *Gibbs, supra; United States* v. *Mulvaney, supra; Stockwell* v. *United States, supra; United States* v. *Zucker, supra.* The whole question of classifying penalty actions as civil or criminal would need to be readdressed if the Government were correct that the basic protection of jury trial available in an ordinary civil action—were not available in penalty actions brought by the Government.

The Drafters of the Seventh Amendment preserved the right to trial by jury in civil cases as one of our basic liberties. It is the Government's position that this right does not apply precisely when it is most needed—when the Government itself brings an action against a citizen. Again, it would be a strange doctrine that a jury must be interposed between a citizen and judgment in an action brought by his neighbor, but not in an action brought by the Government, with its vast resources. The entire purpose of the Bill of Rights was, of course, to protect the liberties of citizens from encroachment *by the Government.* Under the Seventh Amendment, Congress cannot abolish the right to jury trial in private litigation in the Federal courts. Neither the language nor the history of the Seventh Amendment supports the bizarre reading that the opposite result obtains when the Government itself is a party.

Nor can it be maintained that the interposition of a jury between citizen and judgment in civil penalty cases will in any way interfere with important governmental interests. Congress is always free—in cases in which public rights are at issue—to assign the factfinding function and initial adjudication to an administrative agency, without any right to jury trial. *Atlas Roofing Co.* v. *Occupational Safety and Health Review Comm'n, supra; NLRB* v. *Jones and Laughlin Steel Corp., supra.* If the

requirement of a jury trial in civil penalty actions would interfere with the efficiency of an administrative program, Congress is free to avoid the problem entirely by not invoking the jurisdiction of the District Courts. Having invoked that jurisdiction, however, the Government cannot argue that efficiency is an adequate reason for overriding the Seventh Amendment. The Amendment was adopted to protect liberty, not to promote efficiency.

Unlike the statutes applicable in *Atlas Roofing Co.* (factfinding by and penalties assessed in administrative hearing), *Jones and Laughlin Steel Corp* (reinstatement of employee with back wages as restitution by an administrative board), and *Republic Industries* (arbitration concerning amount of pension benefits), Congress did not choose in the Clean Water Act to vest fact-finding or the assessment of civil penalties in an administrative agency. To the contrary, Congress required that actions under the Clean Water Act be brought in the District Courts. This court in *Atlas Roofing*, 430 U.S. at 445, and *Curtis* v. *Loether*, 415 U.S. at 194, made it clear that when the applicable statute places jurisdiction for enforcement of legal remedies in the District Courts, a jury trial is required upon demand.

United States v. *J. B. Williams Co.*, *supra*, is closely on point. There, the Federal Trade Commission asked the Attorney General to seek civil penalties against a company for violation of a cease and desist order. In his opinion for the Second Circuit, Judge Friendly concluded that the company was entitled to a jury trial under the Seventh Amendment. He pointed out that while Congress *could* have granted the Commission itself the power to impose penalties, subject to limited judicial review, it had not done so. 498 F.2d at 430. Pointing to numerous lower court decisions, he stated that "actions for statutory penalties have been held to entail a right to jury trial, even though the statute is silent, both where the amount of the penalty was fixed and where it was subject to the

discretion of the court * * *." *Id.* at 423 (footnote deleted). He concluded: "if in authorizing a civil suit by the chief law officer of the Government, a procedure which had always been thought to entail a right of jury trial, Congress had wished to withhold it (assuming *arguendo* that it could), Congress would have said so in unmistakable terms and not left this as a secret to be discovered many years later." *Id.* at 424-425. Like the statute at issue in *J.B. Williams Co.*, the Clean Water Act contains not a word of legislative history indicating that Congress intended for proceedings under the Act to be governed solely by equitable as opposed to legal principles, or for a jury trial to be denied. *Cf. Curtis* v. *Loether*, 415 U.S. at 192. Where the statute is silent, the result is clear.

IV. There Were Factual Issues For A Jury To Decide In This Case, Both As To Liability And Damages

There must, of course, be a function for the jury to perform for the Seventh Amendment right to apply. Contrary to the Government's assertion that there was no function for a jury to perform in this case, U.S. Br. in Opp. 8, the trial required findings of fact and weighing the credibility of witnesses and evidence. The critical issue in this case is whether a jury or the trial court should have made these findings of fact and judged the credibility of witnesses. The District Court, sitting without a jury, made at least nine clearly defined findings of fact and at least two critical determinations concerning the credibility of Tull's witnesses—disregarding their testimony—which affected the outcome of the case. Pet. App. 32a, 40a, 43a, 44a, 45a, 46a, 47a, 49a, 50a. The court did not comment on the admissions of Government witnesses that they altered key Government exhibits. Every factual allegation of the Government was placed in issue by Tull, except for his admission that the filling he conducted on his properties was done without a permit issued by the Secretary of the Army. The

trial court acknowledged that Tull denied liability on all counts. Pet. App. 31a. As previously noted, the Government presented the testimony of 16 witnesses and moved 87 exhibits into evidence, while Tull presented the testimony of 16 witnesses and moved 46 exhibits into evidence, during the fifteen-day trial. At the conclusion of the case, the District Court, sitting without a jury, made the findings of fact necessary to find in favor of the Government and against Tull.

In addition to determining liability, a jury was also required to fix the amount of damages. The Court of Appeals' assertion that *Hepner*, *supra*, and *Regan*, *supra*, are distinguishable because the civil penalties involved were of a specified amount, $1,000, while the civil penalties contained in 33 U.S.C. § 1319(d) are set at a maximum of $10,000 per day per violation, simply does not square with historical experience and precedence. Pet. App. 9a. As we have pointed out, every reported case since 1775 has held that an action to collect a civil penalty is an action in debt. While the amount of the civil penalty is sometimes fixed, as in *Hepner* and *Regan*, this is not always so. It is not unusual in civil penalty cases for the penalty to be a multiplier of the value of the goods. *Stockwell* v. *United States*, *supra*; *Chaffee* v. *United States*, *supra*. In these cases, it was necessary for the jury to fix the value of the goods before the multiplier was applied. This Court in *Hepner* cited approvingly to *United States* v. *Clafin*, 97 U.S. 546 (1878), as did this Court in *Regan*, for the proposition that "[i]t must be taken as settled law that a certain sum, *or a sum which can readily be reduced to a certainty*, prescribed in the statute as a penalty for the violation of law, may be recovered in a civil action" (emphasis added). Without the Court of Appeals' unwarranted and erroneous assumption that a civil penalty of a maximum amount with no minimum amount is a form of equitable relief, the only difference between *Hepner*, *Regan*, and the instant case is that here *the jury* may set the amout of civil penalties

if it finds a violation of the statute, and in an amount limited by 33 U.S.C. § 1319(d).

It is difficult to understand the lower court's reasoning for its position that a maximum fixed amount is somehow relevant. American juries have for over 200 years been determining questions of fact and assessing penalties and damages. In criminal cases, juries in many States not only find guilt or innocence but fix penalties. Most criminal statutes provide a broad range of discretion to the juries, but with a maximum—*e.g.*, imprisonment for a term of five to fifteen years. Criminal statutes typically provide for juries to impose fines of varying amounts, with the upper limits established by statute. Juries in civil cases not only find liability but set the amount of damages based upon the evidence presented in the case. In appropriate cases, juries also fix the amount of punitive damages. As juries customarily make determinations of the amount of imprisonment, fine, compensatory damages and punitive damages based upon the evidence in each case and from a broad range of possibilities, it is difficult to understand the lower court's rationale for differentiating the instant case from *Hepner* and *Regan*, upon the basis that the amount of the penalty was fixed in those cases.

Nothing in the foregoing in any way undermines the equity jurisdiction of the District Court. The judge in a case involving civil penalties may consider any request for equitable relief, and grant any equitable relief within his jurisdiction. As in any case involving both legal and equitable claims, the judge is of course bound by the findings of fact made by the jury with respect to issues common to the legal and equitable claims. The judge remains free, however, to find those facts that are at issue only with respect to equitable relief, and to fashion such equitable relief as may be appropriate.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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